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No. 88-52

IN THE

Supreme Court of the United States

October Term, 1988

BUFFALO WIRE WORKS COMPANY, INC.,
Petitioner,

vs.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, SAMUEL PIERCE, as Secretary of the United States Department of Housing and Urban Development; BUFFALO URBAN RENEWAL AGENCY (previously known as Department of Urban Renewal and Department of Community Development of the City of Buffalo), CITY OF BUFFALO, JAMES D. GRIFFIN, as Mayor of the City of Buffalo, and as Chairman of the Buffalo Urban Renewal Agency,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Did the Court of Appeals for the Second Circuit err in affirming the opinion of the District Court which found that HUD reasonably determined that Petitioner had received, in state condemnation proceedings, a sum that had substantially the same purpose and effect as a payment for moving expenses under the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970?

2. Did the Court of Appeals for the Second Circuit err in affirming the ruling of the District Court which held that a prior Tax Court decision, which had been affirmed by the Second Circuit, had no collateral estoppel effect on the instant case because the issue involved in the tax litigation was different from the issue involved under the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970?

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents Buffalo Urban Renewal Agency, City of Buffalo and James D. Griffin respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court

of Appeals for the Second Circuit in this case. The Court of Appeals, in affirming without a written opinion the decision of the District Court, for substantially the reasons stated in the District Court's decision, correctly ruled that (1) HUD reasonably determined that Petitioner, whose property was condemned pursuant to the provisions of New York State condemnation law, was not entitled to an award of moving expenses under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. §4601 *et seq.*) (hereinafter, the "Act") because Petitioner had received as part of its condemnation award sums having substantially the same purpose and effect as a payment for moving expenses under the Act and that (2) a prior Tax Court decision, affirmed by the Court of Appeals, had no collateral estoppel effect on this action because the Tax Court case concerned issues different from those contested in this action.

I. Statement of the Case

Respondents Buffalo Urban Renewal Agency (BURA), City of Buffalo and James D. Griffin set forth the salient facts of this case, some of which do not appear in the Petition For a Writ of Certiorari.[1]

On April 25, 1985, Petitioner Buffalo Wire Works Company, Inc. filed an action in the United States District Court for the Western District of New York. The complaint requested judicial review of a decision of February 26, 1985, by the United States Department of Housing and Urban Development (HUD) which upheld a prior BURA decision denying Petitioner's claims under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (the "Act"). BURA and the City of Buffalo were each named in the complaint as the "state agency" responsible for rejection of Petitioner's claims for Federal relocation benefits.

In the District Court, Petitioner sought a total relocation payment of $434,557.77 for "moving expenses", including costs of searching for replacement property, which costs were incurred during the time period of approximately *1956* to early *1973*.

Petitioner's claims relate to the condemnation, in *1967*, of the original Buffalo Wire Works plant in the Waterfront District of the City of Buffalo. Petitioner subsequently moved to its present location at 1165 Clinton Street in Buffalo in March, 1972.

Lengthy condemnation proceedings occurred in New York State Supreme Court, Erie County during the years 1968 through 1972, resulting in that court setting the fair value of Petitioner's land, buildings *and fixtures*

[1] This statement of facts is drawn primarily from the opinion of the District Court, set forth in the Appendix to the Petition for Writ of Certiorari.

pursuant to New York Eminent Domain Law. The state court determined the value of removable fixtures pursuant to the formula prescribed by *Rose v. New York,* 24 N.Y.2d 80, 298 N.Y.S.2d 968 (1969): First, determine two values: (1) the difference between salvage value of the item and present value in place (reproduction cost less depreciation) and (2) *the actual or contemplated costs of disassembling, trucking and reassembling the item at a new location, i.e.* moving costs. The claimant is entitled to the lesser of the two values.

The state court set the first figure, salvage value less present value in place, at $976,813.00. The Court *estimated moving expenses* (because Appellant had *not* yet moved), including "costs of disassembling, trucking, reassembling *and relocation generally*" as follows:

CATEGORY	*AMOUNT*
Motorization and Electrical Preparation of Machinery	$ 19,165.00
Engineering Services	80,718.00
Pneumatic Disconnect and Reconnect	11,101.85
Water Disconnect and Reconnect	516.00
Electrical Disconnect and Reconnect	12,871.02
Wall Openings	Included in Rigger's Estimate
Rigging and Trucking	274,229.00
Moving Raw Materials, etc.	39,750.00
Additional Engineering Service	Included in Rigger's Estimate
Business Interruption, etc.	None
Warehousing	None
Realignment and Rework	39,394.00
Additional Allowance	3,000.00
	480,774.87

Having previously determined the land and buildings values, the state court awarded the following sums:

Value of Land	195,000.00
Value of Buildings	440,000.00
Moving, etc.	480,744.87
Total Award	1,115,744.87

A. Petitioner's Administrative Claims (1972-1974).

Petitioner's initial claim in this matter was made to BURA in *1972.* At a hearing in May 1974, Petitioner demanded total relocation expenses under the Act of approximately $130,050. Approximately $125,000 of that amount consisted of attorney's fees ($114,107.00) and appraisal and witness fees ($11,012.00). At the conclusion of the hearing, Petitioner requested the opportunity to submit legal authority on two specific issues in its claim: attorney's fees and appraisal and witness fees. Petitioner never submitted such authority and no hearing decision ever issued.

B. Petitioner's First Federal Court Action (1973-1975).

Petitioner brought an action in the District Court for the Western District of New York (Civ. No. 1973-43) in *1973* seeking to enforce its rights under the Act. In that action, Petitioner sought essentially the same amounts it sought in its concurrent administrative claim, *i.e.* approximately $130,000, primarily consisting of attorney's fees and appraisal and witness fees. That action was dismissed by the District Court on September 9, 1975 for Petitioner's failure to prosecute it.

C. Administrative (1983-84)/Federal Court 1985.

Not until January 1983, ten years later, did Petitioner claim to be entitled to relocation payments related to the Clinton Street move, despite the fact that all of the

Clinton Street moving expenses had been incurred by mid-1973.

In its submission of January 17, 1983, cast as a "restatement of claim," Petitioner claimed completely new amounts:

Actual moving expenses to 1135 Clinton Street	$279,266.85
Expenses of abandoned move to West Seneca (also called search expenses)	138,784.53
Pre-1965 moving expenses	6,093.39
Pre-1972 moving expenses	10,413.00
Total Relocation Costs	$434,557.77

Absent from the 1983 claims were requests for attorney's fees; added were approximately $413,000 in relocation costs *never before presented to BURA,* even though all the costs were incurred no later than early *1973.*

A comparision between the amounts claimed in 1972-74 and in 1983 follows:

	1972-74 Claims and First Federal Court Claims	*1983 Claims (incurred by mid-1973) and Second Federal Court Claims*
Cost of moving personal property	$ 1,605.00	$295,773.24
Search expenses	9,153.18	138,784.53
Attorney's fees	114,107.00	-0-
Appraisal and witness fees	11,012.00	-0-
Total	$135,877.18	$434,557.77

BURA denied this claim on April 9, 1984, which denial was upheld by HUD on February 26, 1985. Petitioner then again filed suit in the District Court.

D. The District Court Decision.

On November 5, 1987, the District Court, ruling on cross motions for summary judgment, found that the HUD decision rejecting Petitioner's claims was supported by substantial evidence and awarded Respondents summary judgment, dismissing Petitioner's claims. As to the search expenses, the Court upheld HUD's rejection of Petitioner's claim based on laches.[2] As to moving costs, the District Court found that HUD's primary rationale for rejecting the moving expense claims, that any payments under the Act would essentially duplicate amounts already received by Petitioner in the state condemnation award, was reasonable and supported by substantial evidence appearing in the record. It found that "the $480,744.87 state condemnation award paid [Petitioner] $201,748.02 *more* than [Petitioner's] actual moving expenses." (Emphasis in original).

The Court of Appeals for the Second Circuit affirmed, without written decision, the District Court's decision "for substantially the reasons set forth in [the District Court's] decision." Petitioner raises no challenge to the rejection of its claims for search expenses. The Petition is limited to the issue of moving expenses under the Act.

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[2] The Court held that Petitioner had been guilty of laches in the submission of not only the amount it would claim for search expenses under the Act but also the documentation to support characterization of its expenses as search expenses.

II. Summary of Argument

The Court of Appeals for the Second Circuit correctly affirmed the decision of the District Court. The District Court granted summary judgment to Respondents, holding that HUD and BURA had acted reasonably in determining that Petitioner had received in state court condemnation proceedings sums which had the same purpose and effect as would payments under the Uniform Relocation and Real Properties Acquisition Policies Act of 1970 and thus that Petitioner was not entitled to receive further sums. The District Court also determined that a prior tax court proceeding involving Petitioner had no collateral estoppel effect on this action because the tax court proceeding dealt with an issue different from the issue in this action.

No important question of Federal law is presented in the Petition. This case presents a question of agency review which draws on well-settled standards which were properly applied by the Court of Appeals. The Act sets forth a clear standard for comparing sums received under State condemnation law and those available under the Act. Petitioner has failed to demonstrate that HUD, in finding that Petitioner is ineligible to receive moving expenses under the Act because it received sums under state condemnation law having the same purpose and effect as moving expenses available under the Act, was arbitrary or capricious, abused its discretion or otherwise failed to act in accordance with law.

Further, Petitioner has demonstrated no real conflict between the case below and decisions of this Court or appellate courts, including the Second Circuit, on the application of the doctrine of collateral estoppel. That doctrine does not apply in this action because the issue in the tax court litigation, *i.e.*, the treatment, for purposes of the Federal income tax law, of funds received as a result of state court condemnation proceedings, is different from the issue in this action, *i.e.*, whether the funds received in the state court condemnation actions have the same purpose and effect as funds available for moving expenses under the Act.

In neither of its reasons advanced in its Petition has Petitioner set forth compelling grounds for this Court to exercise its discretion to grant Petitioner's request for a Writ of Certiorari.

III. ARGUMENT

POINT I

The Court of Appeals and the District Court correctly applied the appropriate standard in upholding HUD's decision.

In a nutshell, what Petitioner seeks is a double recovery. Petitioner wants to have its fixtures treated for state law purposes and for Federal income tax purposes as if the fixtures were lost and subject to cash reimbursement; yet, in the same breath, it wants the same equipment and machinery to be treated as uncompensated personalty for purposes of receiving a Federal moving expense relocation payment.

Put another way, Petitioner would have this Court believe that it should receive two payments: one from the City of Buffalo as if the fixtures were involuntarily converted; the second from the Federal government as if no portion of the fixtures were converted.

Regardless of whether the payments to Petitioner in the state court condemnation action are called "payments for moving expenses" or "payment for property involuntarily converted," the maximum cap on such payments still remains the cost of moving the fixtures. Any Federal payment that would give Petitioner an amount in excess of the cost of moving would be duplicative of the condemnation award for fixtures and not permissible under the Act.

The Act mandates that displaced individuals and businesses will not obtain duplicate Federal payments for relocation assistance already received through state law:

> No payment or assistance under section 4630 or 4655 of this Title shall be required or included as a program or project cost under this section, if the

> displaced person receives a payment required by the state law of eminent domain *which is determined by such Federal agency head to have substantially the same purpose and effect as such payment under this section, and to be part of the costs of the program or project for which Federal financial assistance is available.*

42 U.S.C. §4631(b) (emphasis added).

This provision duplicates §211(b) of the original Act, in effect in 1972. *See* P.L. 91-646; 84 Stat. 1894 at 1900. See also 24 C.F.R. §42.7 (1973).

HUD found that Petitioner received, as part of its state condemnation award, sums having substantially the same purpose and effect as moving expenses authorized by the Act. Therefore, HUD found Petitioner not entitled to moving expenses under the Act. The District Court and the Second Circuit found this determination to be supported by law and substantial evidence.

A. Displaced businesses' entitlement under the Act.

Section 4622 of the Act provides that the head of a state agency receiving Federal financial assistance for a project shall make a payment to displaced persons, upon proper application, for

> (1) Actual reasonable expenses in moving . . . [a] business, . . . or other personal property;
>
> (2) Actual direct losses of tangible personal property as a result of moving or discontinuing a business . . ., *but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property,* as determined by the head of the agency; and

> (3) Actual reasonable expenses in searching for a replacement business . . . .

42 U.S.C. §4622 (emphasis added). *See also* P.L. 94-646; §202(a); 84 Stat. 1895.

Therefore, a displaced person is *ineligible* to receive any amount in excess of "the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency." 42 U.S.C. §4622, 4631(b).

The House of Representatives, in its legislative report recommending passage of the Act in 1971, anticipated that payments would be made under the Act for direct loss of property, but only up to the value-in-place of the property, and *never to exceed the cost of relocating the property*:

> A person displaced from a business or farm operation may be compensated for actual direct property losses, whether he discontinues, or reestablishes his operation. *However, the maximum amount of any such payment may not exceed the reasonable expenses that would have been required to relocate the property and, in the case of heavy machinery, equipment or other property involving substantial sums, also should not exceed the in-place value of the property.*

H.R. Rep. No. 91-1656, 92d Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5850, 5856 (emphasis added).

The regulations governing the implementation of the Act, 24 C.F.R. 42.1, incorporate the guidelines originally issued by HUD via its Transmittal Notice 1371.1 chg. 1, dated October 29, 1971, and list the criteria to be used by state agencies in evaluating claims for relocation benefits.

B. Plaintiff's entitlement under New York Eminent Domain Law.

The guidelines implementing Sections 4622 and 4631(b) of the Act are identical to the criteria established by New York condemnation law for valuing fixtures which are removed or could be removed from condemned property.

The New York criteria were formulated in *Rose v. New York*, 24 N.Y.2d 80, 298 N.Y.S.2d 968 (1969). In that condemnation case, the New York Court of Appeals ruled that fixtures, which are or could be removed from property taken by eminent domain, must be separately valued in a fashion different from the land and buildings.

As nearly as possible, the owner of the fixtures is to be placed in the same position as he was before the taking, but not in a better financial or operating position. The theory, of course, is that the state is only required to provide just compensation. *Rose*, 24 N.Y.2d at 90, 298 N.Y.S.2d at 978.

In a condemnation proceeding, the fixtures to be moved are valued according to two criteria:

> (1) The differences between the salvage value of the item and the present value of the item in-place; and
>
> (2) The actual or contemplated costs of disassembling, trucking and reassembling the items at a new location, *i.e.*, moving expenses.

Id. at 88, 298 N.Y.S.2d at 976-77.

If the cost of moving is less than the difference between the salvage value and present value in-place, the cost of moving is all the claimant is entitled to recover.

Id. The claimant, however, *retains* the fixtures, a factor which Petitioner tends to ignore. In fact, Petitioner makes the baseless and illogical argument:

> "a displaced person in [Petitioner's] position who chooses to abandon its fixtures is in a substantially better position than one who causes to relocate."

(Petition, at 24).

Much ink has been spilled by both parties in this litigation in an effort to characterize the nature of the payment made to Petitioner in the state court condemnation action, on the theory that the "correct" characterization will determine whether Petitioner's entitlement under the Act has already been satisfied by state law. Petitioner relies on the *Rose* case, but the facts and rationale of that case support HUD's determination that Petitioner is entitled to no more than what it received from the City of Buffalo.

Plaintiff Rose owned two corporations whose businesses were condemned by New York State. The second corporation wished to relocate two machines from the condemned plant site to its new installation. 24 N.Y.2d at 82-84, 298 N.Y.S.2d at 971-73.

The New York Court of Claims had awarded no sums in compensation for the value of these two machines, treating them as personalty. The New York Court of Appeals determined that it would be unfair to characterize these two machines as personalty (and therefore ineligible for any eminent domain compensation) since the machines could be moved normally only at inordinate expense. However, the court also realized that the owner would receive a windfall if the state allowed the corporation to keep the machines

and at the same time be compensated for their total loss as if the machines had been destroyed or retained by the state:

> The claimant is only to be placed in the same position as he was before the taking, not in a better financial or operating position because of the taking to the detriment of the state which is only required to make just compensation.

24 N.Y.2d at 90, 298 N.Y.S.2d at 978.

The *Rose* court, in order to provide additional compensation for movable fixtures over and above the statutory amount allowed for personalty, allowed the owner to receive a payment for the fixtures' value lost because of the condemnation, but set a maximum limit on that amount (no more than the cost of moving) to prevent the owner from receiving a windfall as a result of the condemnation. The *Rose* criteria resulted from the court's efforts to decide the appropriate compensation to be paid by the state for fixtures, like the two machines, which were located on condemned property, but could "be profitably removed to another location and used by the owner." *Id.* at 86, 298 N.Y.S.2d at 974-5.

Petitioner has admitted that it opted to remove its fixtures from the waterfront property and so notified the state court. Petition, at 5.

Petitioner focuses on the question: did the condemnation award from the City of Buffalo for fixtures (capped at the cost of moving) constitute a payment for loss of property or a payment for moving expenses? Interestingly, the *Rose* case labelled the payment "reasonable moving fees". *Id.* at 90, 298 N.Y.S.2d at 978. The United States Tax Court and the Second Circuit in the Buffalo Wire Works Tax Court litigation characterized the payment, for income tax purposes, as

an "amount realized from the involuntary conversion of property into money" rather than reimbursement for moving expenses. *Buffalo Wire Works v. Commissioner*, 74 T.C. at 937. In *E.R. Hitchcock Co. v. United States*, 514 F.2d 484 (2d Cir. 1975), cited as controlling authority in the Buffalo Wire Works Tax Court decision, the Second Circuit called such payments "severance damages" and "*an amount attributed to moving expenses paid as a part of the award on condemnation*" and acknowledged that the payments were made to compensate the taxpayer for property taken. *Id.* at 486 (emphasis added).

The point is that the amount eventually received by Petitioner for the fixtures, $480,744.87, was *equivalent to* the projected cost of moving the fixtures to West Seneca, since that amount was less than the salvage value of the fixtures less depreciation. The City of Buffalo, in effect, compensated Petitioner as if it forced a sale of the fixtures, irrespective of whether Petitioner eventually kept the fixtures.

Thus, after February 15, 1972 Petitioner was free to keep and move the fixtures despite its receiving compensation for them, but it was not entitled to receive a double recovery under the Act. In fact, the amount Petitioner received far exceeded (by over $200,000) the actual cost of the move to Clinton Street.

In analyzing Petitioner's contentions, it must be kept in mind that "relocation payments" under the Act are defined to include:

> 1. *Actual reasonable expenses in moving* himself, his family, business, farm operation or other personal property;

> 2. *Actual direct losses of tangible personal property as a result of moving* or discontinuing of business or farm operation, *but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency*; . . . .

42 U.S.C. §4622(a) (emphasis added).

Even if we assume, for the sake of argument, that Petitioner did in fact receive a payment from the City on the theory that its movable fixtures had been involuntarily converted into money (or lost and reimbursed), such a payment still includes the equivalent of a relocation payment for "actual direct losses of tangible personal property as a result of moving or discontinuing of business . . . but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property . . . ." 42 U.S.C. §4622(a)(2). The *Rose* formula is thus congruent with the Act's direct payment loss formula.

The Act is crystal clear that *even when fixtures are completely liquidated and left at the old facility, the maximum Federal relocation payment can never exceed the cost of moving those same fixtures.* 42 U.S.C. §4622(a)(2). How much more so, then, when fixtures are moved and kept by the owner, should the relocation payment be capped at the cost of moving!

C. Petitioner received a payment pursuant to state law more than equal to the reasonable cost of relocating its fixtures.

None of the Respondents claim that Petitioner ever received an award from the City to *reimburse* it for *actual* moving costs. However, as the District Court correctly pointed out:

> . . . it is a different question whether [the state court award of $480,744.87] has "substantially the same purpose or effect as a payment of actual moving expenses." There is certainly no question that the [state court] award was *for* moving expenses, as reflected in the itemized description [of the state court condemnation award].

(Emphasis in original).

HUD correctly determined under the Act that Petitioner's condemnation award was the substantial equivalent of any relocation payment it might have been entitled to under the Act.

The District Court correctly found HUD's reasoning and analysis to be reasonable based on the record. The Court of Appeals' affirmance of the District Court should not be disturbed.

POINT II

The prior Tax Court case has no preclusive effect on the issue of Appellant's eligibility for federal relocation benefits.

Petitioner argues that the Tax Court's description of the condemnation award precludes, under the doctrine of collateral estoppel, finding that Petitioner received a payment substantially duplicative of a relocation payment under the Act. The Tax Court case has no such effect.

Petitioner's characterization of the issues before the United States Tax Court and the Second Circuit in *Buffalo Wire Works, Inc. vs. Commissioner of Internal Revenue,* 659 F.2d 1058 (1981) [affirming 74 T.C. 925 (1980)] is simply incorrect. A close examination of the Tax Court decision and its precedents confirms that it is limited in scope and perfectly consistent with the decisions of HUD, the District Court and the Second Circuit in this action.

At issue in the Tax Court proceeding was section 1033 of the Internal Revenue Code which is a "relief provision enacted to allow a taxpayer to replace property involuntarily converted without paying the capital gains tax incident to other exchanges of property . . . and is to be construed liberally to achieve its purpose." *E.R. Hitchcock Co. vs. United States,* 514 F.2d at 486, citing *John Richard Corporation,* 46 T.C. 41, 44 (1966).

On its 1972 tax return, Petitioner elected under Section 1033 to recognize the gain from the involuntary conversion of its waterfront property only to the extent that the amount realized upon the conversion exceeded the cost of the Clinton Street replacement property.

Because Petitioner spent more for its replacement property than it received in the condemnation action, it reported no gain.

Petitioner had also claimed "moving expense" deductions in 1972 and in prior years over and above the $1,060,734.00 it paid for the replacement property.

The IRS argued that Petitioner was required to report as ordinary income an amount equivalent to all of the prior moving expense deductions, part as reimbursement for moving expenses and part as excess reimbursement for moving expenses. The term "moving expenses" here refers to the amounts for which moving expense deductions had already been taken. The IRS claimed that Petitioner could use section 1033 to claim non-recognition of gain only for the portion of the condemnation award that exceeded the prior years' moving expense deductions.

The Tax Court and the Second Circuit overruled the IRS and allowed Petitioner to claim non-recognition of gain under section 1033 for both the "land and building" and the "fixtures, etc." portions of the condemnation award, citing two cases as controlling authority, *Hitchcock v. United States, supra* and *Graphic Press Inc. vs. Commissioner,* 523 F.2d 585 (9th Cir. 1975), reversing 60 T.C. 674 (1973).

In *Hitchcock,* the Second Circuit treated "an *amount attributed to moving expenses paid as a part of the award on condemnation*" as eligible for section 1033 treatment. 514 F. 2d at 486 (emphasis added). Contrary to Petitioner's arguments, the Second Circuit made its decision in *Hitchcock* "[w]ithout relying on the state law concept of a condemnation award including moving expense as a factor in fair market value", but instead

because "it is an economic fact that this taxpayer received moving expense money solely as a result of the condemnation and as a matter of State law." *Id.* at 487.

In the *Graphic Press* case, the Ninth Circuit put it another way:

> We believe compensation in excess of land and building payments in this case qualifies for section 1033 treatment. From the taxpayer's viewpoint, he is being compensated for a loss due to the condemnation of his property. Whatever payment the taxpayer receives is attributable to the involuntary conversion. *Where, as here, a payment is made for relocation costs in addition to land and building costs,* as long as the condemnee reinvests the total award into other property similar or related in service or use within the statutory period, both the language and the spirit of the statute have been met.

523 F.2d at 589 (emphasis added).

The above quotations from the *Hitchcock* and *Graphic Press* cases pinpoint exactly what Petitioner received in the State action: an "amount attributed to moving expenses paid as part of the award on condemnation" and "payment . . . for relocation costs in addition to land and building costs." These amounts are precisely what Petitioner would be entitled to under the Act. Thus, Petitioner is not entitled to an award under the Act since it already received funds equivalent to and with the same purpose and effect as a relocation payment.

The District Court below correctly determined that the treatment of a condemnation award under I.R.C. §1033 is an entirely different issue from the question of equivalency under §4631(b) of the Act:

> . . . the holding [of the Tax Court decision] is a narrow one, not apposite to the issue before HUD. [The Tax Court decision] is only concerned with the

> tax identity of the money received by plaintiff for "moving, etc." in the State condemnation award. For Federal tax purposes, there is a categorical distinction, a difference in income, between payment received for an involuntary conversion of property into money, and payment received for moving expenses. But for purposes of the issue before HUD, that distinction is immaterial. There is no necessary incompatibility between the holding in [the Tax Court] that [Petitioner's] payment was an involuntary conversion of property into money and HUD's finding that [Petitioner's] payment had substantially the same purpose or effect as the payment for actual reasonable moving expenses. *Put simply.* [*Petitioner*] *may have received payment having the same purpose or effect as actual moving expenses as part of an involuntary conversion of property into money.*

(Emphasis added).

It is a long-settled principle of tax law that the application of the Internal Revenue Code need not be *in pari materia* with economic reality, other laws or statutes. For example, income for tax purposes is to be determined by the tax statute and not under accounting principles. 1 Martens, *Law of Federal Income Taxation,* Section 5.03 (1985); *Gulf Power Company,* 10 T.C. 852 (1948) (accounting rules and practices required by a public utility for Federal Power Commission purposes are not controlling on tax questions).

The income tax laws do not profess to embody perfect economic theory. *Weiss v. Weiner,* 279 U.S. 333 (1929); *Fraser v. Commissioner,* 25 F.2d 653, 655 (2d Cir. 1928) ("Some gross accommodation to the economic reality is all that is demanded; it is not fatal that the fit is not perfect.")

For example, the definition of "gift" for purposes of the income tax code have been held not to be *in pari materia* with either the estate tax law or the gift tax statute. *Galt v. Commissioner,* 216 F.2d 41 (7th Cir. 1954), *cert. denied* 348 U.S. 951 (1955); *Farid-Es-Sultaneh v. Commissioner,* 160 F.2d 812 (2d Cir. 1947).

Different public policies often mandate different treatment of what on the surface seem to be the same concepts for purposes of different Federal laws. *See,* for example, the definition of "wine" for purposes of the Revenue Act of 1918 and the Federal Alcohol Administration Act in *Sterling Cider Company v. Hassett,* 133 F.2d 590, 593 (1st Cir. 1943) and the uses of the terms "seamen," "bargeman" and "crew" in the Social Security Act and Long Shoreman's and Harbor Workers Compensation Act in *Berwind-White Coal Mining Company v. Rothensies,* 137 F.2d 60 (3d Cir. 1943).

In *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.,* 404 F.2d 804 (1968) *cert. denied* 393 U.S. 1093 (1969), the District of Columbia Circuit refused to treat a Federal Maritime Commission ruling that defendants' activities had no effect on United States "foreign commerce" as a bar to a determination that the same activities restrained "foreign commerce" for purposes of the Sherman Act:

> It is commonplace in the law to encounter instances of the same words being given different scope in different contexts . . . Accordingly, defendants cannot bootstrap the Commission's determination into a preclusive ruling on whether foreign commerce was restrained under Sherman Act standards.

404 F.2d at 810-11.

Petitioner's Tax Court litigation against the United States as tax imposer and collector concerned the tax treatment of the condemnation award under §1033 of the Federal Tax Code. *It did not concern whether Petitioner was entitled to receive relocation payments or their equivalent from the United States acting as regulator.*

Lastly, this Court should be aware of another point which Petitioner ignores.[3] The treatment, for tax purposes, of its condemnation award, under the Tax Court and Second Circuit rulings is identical to the tax treatment provided by the Act to moving expense awards:

> No payment received under [the Act] shall be considered as income for purposes of Title 26, . . . or any other Federal Law."

42 U.S.C. §4636.

[3] In fact, the Petition at p. 21 infers that the opposite is true.

POINT III

Petitioner has failed to demonstrate that an important question of Federal Law is at issue in this case.

In a desperate effort to encourage this Court to grant its petition, Petitioner has attempted to show that an important question of Federal Law is at issue. Petitioner argues that HUD has "failed to set forth any guidance with respect to, and [has] basically ignored" New York condemnation law and its relationship with the Act. Petition, at 21. As a result, Petitioner claims that (1) future displaced persons are left without guidance and (2) displaced persons will not be treated uniformly in accordance with the goals of the Act. *Id.* at 22-23.

As to the alleged failure of HUD to set forth guidance or standards, Petitioner misses the mark. The standard to be applied is supplied by the Act itself, *i.e.*, whether the State condemnation award, or a portion thereof, is the substantial equivalent of a payment for moving expenses under the Act. The HUD decision does cite the state condemnation award decision and the *Rose* standards.

The standard Petitioner should address, but does not, is the proper standard of review of an agency action. The permissible scope of judicial review of agency action is extremely limited; the presumption exists that agency action interpreting and applying its own rules are valid. *Udall v. Tallman*, 380 U.S. 1 (1965); *Rochester Telephone Corporation v. United States*, 307 U.S. 125 (1939). *See also Ethyl Corporation v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976) (*en banc*), *cert. denied* 426 U.S. 941. The burden is on the party challenging the agency. *Maryland-National Capital Park and Planning Commission v. Lynn*, 514 F.2d 829, 834 (D.C. Cir. 1975).

An agency decision must be upheld unless it is arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. §706(2)(A-C); *Nagi v. United States*, 751 F.2d 826, 828 (6th Cir. 1985) (applying Uniform Relocation Act); *Public Interest Research Group v. FCC*, 522 F.2d 1060 (1st Cir. 1975) *cert. denied* 424 U.S. 965 (1976); *Richardson v. Simon*, 420 F. Supp. 916, 918 (E.D.N.Y.) *aff'd* 560 F.2d 500 (2d Cir. 1977), appeal dismissed 435 U.S. 939; *Starke v. HUD*, 454 F. Supp. 477, 483 (W.D. Okla. 1976) (applying Uniform Relocation Act).

In reviewing agency action, this Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) ("[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency.")

As outlined in Point I, *supra*, the District Court applied the appropriate standards in upholding HUD's decision that the condemnation award had the same purpose and effect as would a relocation payment under the Act. The Court of Appeals' affirmance thus was proper.

IV. Conclusion

This case does not raise an important issue under Federal law regarding the application or interpretation of the Uniform Relocation and Real Property Acquisitions Policies Act of 1970. The Court below properly applied the standards involving review of agency decisions.

Nor does this case raise an important question regarding the applicability of the doctrine of collateral estoppel. Prior tax court litigation involving Petitioner dealt with an issue under Federal tax law. This case involves the interplay between state condemnation law and the Uniform Relocation Act. The Petition for Certiorari should thus be denied.

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Buffalo, New York

Respectfully submitted,

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